

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY BOYKINS,	:	CIVIL ACTION
Petitioner	:	
	:	
	:	
v.	:	
	:	
FRANK TENNIS, WARDEN, SCI	:	
ROCKVIEW, et al.,	:	
Respondents	:	NO. 04-1174

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

July 22, 2004

**I. INTRODUCTION**

Petitioner Anthony Boykins ("Boykins"), a prisoner at the State Correctional Institution at Rockview, filed a petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 on March 18, 2004. The petition was referred to United States Magistrate Judge Arnold C. Rapoport ("Judge Rapoport"), who found the petition untimely, and issued a Report and Recommendation ("R&R") that it be denied and dismissed without an evidentiary hearing. (Paper No. 9).

Boykins, filing objections to the R&R, asserted ineffective counsel denied him the right to an appeal. After de novo review of the R&R and Boykins's claims and objections, the court finds the petition time-barred.

**II. BACKGROUND**

After a bench trial before Judge Lisa A. Richette in the

Court of Common Pleas of Philadelphia County, Boykins was convicted of third degree murder and possession of an instrument of crime. He was sentenced to an aggregate term of ten to twenty years' imprisonment on July 23, 1998. No direct appeal was filed.

Counsel for Boykins filed a petition under the Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541, et seq. on August 21, 1998. The PCRA petition was dismissed on January 12, 2000, and Boykins did not file an appeal. Counsel for Boykins filed a second PCRA petition on January 22, 2002, which was dismissed as untimely on November 12, 2002. The Superior Court affirmed the dismissal. Commonwealth v. Boykins, 847 A.2d 755 (Pa. Super. Ct. 2004) (unpublished table decision).

Boykins, filing the instant Petition for Writ of Habeas Corpus, requested he be granted a nunc pro tunc direct appeal of his original conviction to the Pennsylvania Superior Court. He asserts that ineffectiveness of his trial and post-conviction counsel in failing to meet state court filing deadlines denied him his right to direct review, so the statute of limitations should be equitably tolled. Judge Rapoport found the petition untimely and barred by the one-year statute of limitations for habeas corpus actions.

### **III. DISCUSSION**

#### **A. One-Year Time Limit on Habeas Petitions**

The Antiterrorism and Effective Death Penalty Act of 1994 ("AEDPA") Pub. L. 104-132, 28 U.S.C. § 2244(d), provides a one-year time limit:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State Court. The limitation period shall run from the latest of -

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment of filing an application created by the State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Boykins does not assert there was some state action creating an impediment to filing, or some constitutional right was newly recognized by the Supreme Court, or new facts were discovered. Accordingly, the limitations period began to run on the date his conviction became final by the conclusion of direct review or the expiration of time for seeking direct review, *i.e.*, on August 23,

1998. 28 U.S.C. § 2244(d)(1)(A).

Under § 2244(d)(2), the limitations period is tolled while a properly filed action for state post-conviction relief is pending. Boykins's first PCRA petition, filed August 21, 1998, was pending until January 12, 2000. After the expiration of the 30-day period for seeking appellate review, the AEDPA limitations period began to run, and ended February 13, 2001.

Boykins's second PCRA petition, dismissed as time-barred, was not properly filed so it did not qualify for the § 2244(d)(2) exception. Merritt v. Blaine, 326 F.3d 157, 166-67 (3d Cir. 2003), cert. denied, 124 S.Ct. 317 (2003).

#### **B. Equitable Tolling**

The AEDPA one-year time statutory limitation can be equitably tolled when the rigid application of the limitation period would be unfair under principles of equity. Miller v. New Jersey State Dep't. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998).

For equitable tolling, the petitioner must show: 1) he was actively misled; 2) he has been prevented from asserting his rights in some extraordinary way; or 3) he timely asserted his rights mistakenly in the wrong forum. Jones v. Morton, 195 F.3d 153, 159 (3d Cir. 1999). In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the "extraordinary" circumstances required for equitable tolling. See Fahy v. Horn, 240 F.3d 239, 244 (3d

Cir. 2001); Johnson v. Hendricks, 314 F.3d 159, 163 (3d Cir. 2002).

A petitioner must also show reasonable diligence in bringing the claims he seeks to have equitably tolled. Miller, 145 F.3d at 618-19. The petitioner must show "consistent assiduousness" in pursuing his claim to meet this reasonable diligence standard. Seitzinger v. Reading Hosp. & Med. Ctr., 165 F.3d 236, 241 (3d Cir. 1999).

Boykins has not claimed he was actively misled or that he mistakenly asserted his *habeas* rights in the wrong forum. The only possibility for equitable tolling is that some extraordinary circumstance prevented him from asserting his rights in federal court within the one-year period allowed. Boykins claims that the ineffectiveness of his trial counsel in failing to make a direct appeal constitutes such error. Boykins also asserts the ineffectiveness of later counsel was the cause of his delay in filing. These claims do not rise to the level of an extraordinary circumstance in a non-capital case. See Johnson, 314 F.3d at 163.

Boykins did not appeal the denial of his first PCRA petition; Boykins had the opportunity to file a federal habeas petition for thirteen months after the dismissal of his first PCRA petition, and failed to do so. He then waited two years to file a second PCRA petition. Boykins did not exercise reasonable diligence in pursuing his claims, as required by Miller and

Seitzinger. Equitable tolling is not appropriate.

#### **IV. CONCLUSION**

Boykins's petition is untimely; this court will adopt the Report and Recommendation of Judge Rapoport. An appropriate order follows.

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ORDER

AND NOW, this \_\_\_\_ day of July, 2004, upon consideration of petitioner's Petition for Writ of Habeas Corpus by a person in state custody pursuant to 28 U.S.C. § 2254 (Paper No. 1), United States Magistrate Judge Arnold C. Rapoport's Report and Recommendation (Paper No. 9), Petitioner's Objections to the Report and Recommendation of the Magistrate Judge (Paper No. 10), for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation (Paper No. 9) is **APPROVED AND ADOPTED**;
2. Petitioner's Objections to Magistrate Judge's Report and Recommendation (Paper No. 10) are **OVERRULED**;
3. Petitioner's Petition for Writ of Habeas Corpus by a person in State Custody (Paper No. 1) is **DENIED**;
4. There is no probable cause to issue a certificate of appealability;
5. The Clerk of the Court shall mark this case closed.

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Norma L. Shapiro, S.J.